No. 96-757

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1996

Alison Ward,
Petitioner,

v.

City of Streetsboro, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should a Petition for a Writ of Certiorari be denied in a Title VII case where an employer takes prompt, adequate and reasonable remedial measures to protect a female employee from harassing conduct in the work place in circumstances where the perpetrator of such conduct is unknown?

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STATEMENT OF THE CASE

A. Statement of Facts

In October, 1991, the Petitioner began her employment with Respondent, City of Streetsboro, as a part time firefighter/emergency medical technician. In July, 1992, Petitioner alleges that a series of harassing events began to occur, which are set forth on page 3 of her Petition for a Writ of Certiorari.

Respondent, Gerald Vicha, Fire Chief, became aware of the harassing conduct about the third or fourth week of September, 1992. The source of this knowledge was not the Petitioner but rather, another firefighter.

The Fire Department of the City of Streetsboro is a part time fire department. The Respondent, Fire Chief Gerald Vicha, is a part time employee, as was Petitioner and all other employees of the City of Streetsboro Fire Department.

In an effort to respond to the harassment, numerous remedial efforts were undertaken, which included:

1. Placing a telephone tap, under the direction of Ohio Bell Security, in October, 1992;

2. Conducting a meeting with Fire Department staff to ensure its members understood that harassment would not be tolerated;

3. Appointing an internal affairs officer to determine who was behind the alleged harassment;

4. Conducting an initial police investigation by Police Sargeant Taiclet in October, 1992;

5. Allowing an exception for Petitioner to take her fire gear home to avoid water and eggs in said fire gear;

6. Issuing a written directive to all Fire Department employees that harassment would not be tolerated;

7. Conducting a personal investigation of the harassing events, during which Fire Chief Vicha questioned firefighters as to their knowledge;

8. Initiating a full police investigation by Sargeant Stankowicz of the Streetsboro Police Department;

9. Firing an employee who admitted writing an harassing note to himself;

10. Taking certain affirmative actions during the course of the police investigation, including the use of polygraph test, fingerprinting, handwriting analysis, interviews of Fire Department employees, and obtaining witness statements of Fire Department employees.

When the police investigation was suspended, the Police Department determined that very little had been absolutely ascertained, other than Dave Fronek admitting that he wrote the letter to himself (for which he was ultimately fired) and that Petitioner Alison Ward had failed parts of her polygraph examination. The polygraph examiner concluded deception by Petitioner when he questioned whether she knew who committed any of the acts of harassment against her, to which she answered, "No". The polygraph examiner also concluded that Alison Ward showed deception in responding to whether or not she committed any of those overt acts herself, to which she responded, "No". Further, the polygraph examiner concluded deception in her response as to whether she told the entire truth regarding the case in question, to which she answered, "Yes". Chief Vicha also indicated that when the

investigation produced no known perpetrator, he began to suspect that the Petitioner might be doing the acts of harassment to herself. Moreover, there is evidence that the Petitioner refused to cooperate with the investigation.

During the initial police inquiry with Sargeant Taiclet, Petitioner indicated that she did not wish to continue the investigation though Sargeant Taiclet remained ready to pursue it even on a non-criminal basis. She also initially refused to cooperate with a request for a polygraph examination. Further, Petitioner failed to report harassing conduct as it occurred, which prompted Chief Vicha to ask the Petitioner's husband to encourage his wife to cooperate. Finally, the Petitioner contended that she had been threatened by a non-officer of the Streetsboro Fire Department in December of 1993, but indicated she would not reveal his identity even if ordered to do so by the court.

B. Course of Proceedings and Disposition of Case Below

On March 28, 1994, Petitioner filed her Complaint in the United States District Court for the Northern District of Ohio. The Complaint alleged violations of Section 703(a)(1) and Section 704(a) of Title VII of the Civil Rights Act of 1964.

On May 22, 1995, the District Court issued a Judgment granting Summary Judgment to Respondents on all claims in the case. Petitioner followed by filing a Motion to Alter or Amend the Judgment. On July 5, 1995, the District Court issued an Order denying this Motion. On August 3, 1995, Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit.

On June 24,1996, the United States Court of Appeals for the Sixth Circuit in a *per curiam* opinion affirmed the Judgment of the United States District Court for the Northern District of Ohio.

This matter now rests before this Honorable Court on a Petition for a Writ of Certiorari filed by Petitioner Alison Ward.

C. Correction of Misstatements in the Petition

Petitioner alleges in her Petition that a surveillance camera and a camcorder were available for use by Fire Chief Gerald Vicha in detering persons from engaging in harassing conduct but Chief Vicha refused to utilize said equipment. Petitioner's Statement of the Facts in that regard ignores the evidence that the video camera in question was borrowed equipment and that Fire Chief Vicha made a judgment call that a temporary surveillance camera would not be permanently effective in eliminating harassment or in assisting to identify the perpetrator.

With regard to the camcorder, the evidence is that the camera was purchased in December, 1992 and not used for a number of reasons. Using the camcorder for surveillance of parking lot entrances would have meant installing it on a vacant storefront on a building across the street. The Chief decided instead, after discussion with the Police Department, to have police officers put on special alert in paying attention to the parking lot. Additionally, the camcorder was also needed for teaching and training purposes and installing the camcorder inside the area were Petitioner's gear was stored would have made it open and

obvious to the perpetrator, as was the case with the video camera. Moreover, the camcorder would have required constant insertion of tapes every two to four hours.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Respondents certainly do not contest the proposition that an employer has a duty to provide a work place environment free from harassment based upon sex. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986). Moreover, Respondents stand in agreement that an employer, when placed on notice of harassing conduct based upon sex in the work place, has a duty to take prompt and adequate remedial action reasonably calculated to put a halt to the offending conduct. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) and *Kaufmann v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992).

However, an employer can avoid Title VII liability if prompt and adequate remedial action is taken to protect the victim of harassment. See *Swentek v. U.S. Air, Inc.*, 830 F.2d 552 (4th Cir. 1987) and *Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir. 1993).

Petitioner has taken the position that not only did Respondents have a duty to take prompt and adequate remedial measures but further, had a responsibility to effectively eliminate any harassing conduct. In advancing this argument, Petitioner seeks to rely, in large measure, upon the cases of *Fuller v. City of Oakland*, 47 F.3d 1522 (9th

Cir. 1995) and *Winsor v. Hinckley Dodge*, 79 F.3d 996 (10th Cir. 1996). Those cases, however, cannot be applied to the facts of the case at bar. In the *Fuller* case, the perpetrator of the harassing conduct was known. In fact, the perpetrator was a fellow police officer who continued to harass Ms Fuller over an extended period of time, even when he was transferred into a position with supervisory authority over Ms Fuller. The response of the Defendant, City of Oakland, was summarized as one of "inaction". The Court held that Title VII does not permit employers to stand idly by once they learn that sexual harassment has occurred. Moreover, in the *Winsor* case the facts clearly established that Defendant Hinckley Dodge took virtually no remedial action to protect Ms Winsor from a hostile work environment in the work place. Ms Winsor's harassers were fellow employees who were known to her employer. Clearly then, these two cases cannot be applied to the matter that now rests before this Honorable Court.

In the case at bar, the perpetrator or perpetrators of the harassing conduct were unknown. Respondents did not sit upon their hands when they were placed upon notice of the harassing conduct. Numerous steps to prevent the conduct and to ascertain the identity of the perpetrator or perpetrators were undertaken by the Respondents. Moreover, both the District Court and the Sixth Circuit Court of Appeals found that Respondents discharged their duty to the Petitioner by taking those prompt and adequate remedial measures. Without question, those measures were reasonably calculated to put an end to the conduct. However, in circumstances where the perpetrator or perpetrators remain unknown, the employer is powerless to end the conduct, especially in circumstances where it might

appear to be reasonable that the Petitioner knew more about the harassment than she revealed and further, did not cooperate in efforts to end it or to ascertain the identity of those responsible for it.

Both the District Court and the Sixth Circuit Court of Appeals held that there was ample evidence to support a ruling that prompt and adequate remedial action had been taken and further that Respondents took more than reasonable measures to put an end to the harassment of which the Petitioner complained. Ample and reasonable efforts were made to discover the identity of the perpetrator which, however, did not produce a suspect. Accordingly, since there was no suspect, Respondents had no one to discipline. Unquestionably, Respondents put forth a good faith effort to put a halt to the harassing conduct and to ascertain the identity of the perpetrator or perpetrators. That effort was manifested by prompt and adequate remedial action reasonably calculated to put a halt to the harassing conduct. As the District Court and the Sixth Circuit Court of Appeals found, Respondents could not be reasonably expected to do more than they did in their numerous efforts to protect the Petitioner in the work place.

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CONCLUSION

Accordingly, for the reasons cited herein, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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